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6 Attorneys for Defendants City of Hayward,  
Art Thoms, Scott Lungner, and Zachary Hoyer

7 UNITED STATES DISTRICT COURT  
8  
9 NORTHERN DISTRICT OF CALIFORNIA

10 KEVIN WALKER

Case No.: C 07 06205 (TEH)

11 Plaintiff,

DEFENDANTS' ANSWER TO FIRST  
AMENDED COMPLAINT

12 -vs-

AND

13 CITY OF HAYWARD, OFFICER ART  
THOMS, OFFICER SCOTT LUNGER, and  
14 OFFICER ZACHARY HOYER, individually and  
in their official capacities; AMERICAN  
15 DISCOUNT SECURITY, and DAUD  
WARWDAK aka DAVID WARDAK,

DEMAND FOR TRIAL BY JURY

16 Defendants

17 \_\_\_\_\_/

18 Defendants City of Hayward, Art Thoms, Scott Lungner, and Zachary Hoyer respond to  
19 plaintiff's first amended complaint ("plaintiff's complaint" or "complaint") for damages, as  
20 follows:

21 1. Defendants have insufficient information and knowledge to respond to the  
22 allegations contained in paragraph 1 of plaintiff's complaint, and, on that basis, deny generally  
23 and specifically each and every allegation contained in said paragraph.

24 2. Defendants have insufficient information and knowledge to respond to the  
25 allegations contained in paragraph 2 of plaintiff's complaint, and, on that basis, deny generally  
26 and specifically each and every allegation contained in said paragraph.  
27

1           3.       Defendants have insufficient information and knowledge to respond to the  
2       allegations contained in paragraph 3 of plaintiff's complaint, and, on that basis, deny generally  
3       and specifically each and every allegation contained in said paragraph.

4           4.       Defendants have insufficient information and knowledge to respond to the  
5       allegations contained in paragraph 4 of plaintiff's complaint, and, on that basis, deny generally  
6       and specifically each and every allegation contained in said paragraph.

7           5.       Defendants admit that plaintiff purports to bring this action pursuant to Title 42  
8       of the United States Code Section 1983 and 1988, and the Fourth and Fourteenth Amendments to  
9       the United States Constitution, otherwise defendants deny generally and specifically each and  
10      every remaining allegation of paragraph 5 of plaintiff's complaint.

11          6.       Defendants have insufficient information and knowledge to respond to the  
12      allegations contained in paragraph 6 of plaintiff's complaint, and, on that basis, deny generally  
13      and specifically each and every allegation contained in said paragraph.

14          7.       Defendants admit that the City of Hayward is a municipal corporation and admit  
15      that Art Thoms, Scott Lunger, and Zachary Hoyer are/were Hayward Police Department  
16      officer(s), otherwise defendants deny generally and specifically each and every remaining  
17      allegation of paragraph 7 of plaintiff's complaint.

18          8.       Defendants admit that Art Thoms is/was a Hayward Police Department officer,  
19      otherwise defendants deny generally and specifically each and every remaining allegation of  
20      paragraph 8 of plaintiff's complaint.

21          9.       Defendants admit that Scott Lunger is/was a Hayward Police Department officer,  
22      otherwise defendants deny generally and specifically each and every remaining allegation of  
23      paragraph 9 of plaintiff's complaint.

24          10.      Defendants admit that Zachary Hoyer is/was a Hayward Police Department  
25      officer, otherwise defendants deny generally and specifically each and every remaining allegation  
26      of paragraph 10 of plaintiff's complaint.

1           11. Defendants have insufficient information and knowledge to respond to the  
2 allegations contained in paragraph 11 of plaintiff's complaint, and, on that basis, deny generally  
3 and specifically each and every allegation contained in said paragraph.

4           12. Defendants have insufficient information and knowledge to respond to the  
5 allegations contained in paragraph 12 of plaintiff's complaint, and, on that basis, deny generally  
6 and specifically each and every allegation contained in said paragraph.

7           13. Defendants have insufficient information and knowledge to respond to the  
8 allegations contained in paragraph 13 of plaintiff's complaint, and, on that basis, deny generally  
9 and specifically each and every allegation contained in said paragraph.

10           14. Defendants have insufficient information and knowledge to respond to the  
11 allegations contained in paragraph 14 of plaintiff's complaint, and, on that basis, deny generally  
12 and specifically each and every allegation contained in said paragraph.

13           15. Defendants admit that plaintiff purports to invoke the jurisdiction of the court  
14 pursuant to Title 28, United States Code Sections 1331 and 1343, otherwise defendants deny  
15 generally and specifically each and every remaining allegation of paragraph 15 of plaintiff's  
16 complaint.

17           16. Defendants have insufficient information and knowledge to respond to the  
18 allegations contained in paragraph 16 of plaintiff's complaint, and, on that basis, deny generally  
19 and specifically each and every allegation contained in said paragraph.

20           17. Defendants admit that the City of Hayward is located in the County of Alameda,  
21 otherwise defendants deny generally and specifically each and every remaining allegation of  
22 paragraph 17 of plaintiff's complaint.

23           18. Defendants have insufficient information and knowledge to respond to the  
24 allegations contained in paragraph 18 of plaintiff's complaint, and, on that basis, deny generally  
25 and specifically each and every allegation contained in said paragraph.

26           19. Defendants have insufficient information and knowledge to respond to the  
27 allegations contained in paragraph 19 of plaintiff's complaint, and, on that basis, deny generally

1 and specifically each and every allegation contained in said paragraph.

2 20. Defendants have insufficient information and knowledge to respond to the  
3 allegations contained in paragraph 20 of plaintiff's complaint, and, on that basis, deny generally  
4 and specifically each and every allegation contained in said paragraph.

5 21. Defendants have insufficient information and knowledge to respond to the  
6 allegations contained in paragraph 21 of plaintiff's complaint, and, on that basis, deny generally  
7 and specifically each and every allegation contained in said paragraph.

8 22. Defendants have insufficient information and knowledge to respond to the  
9 allegations contained in paragraph 22 of plaintiff's complaint, and, on that basis, deny generally  
10 and specifically each and every allegation contained in said paragraph.

11 23. Defendants have insufficient information and knowledge to respond to the  
12 allegations contained in paragraph 23 of plaintiff's complaint, and, on that basis, deny generally  
13 and specifically each and every allegation contained in said paragraph.

14 24. Defendants have insufficient information and knowledge to respond to the  
15 allegations contained in paragraph 24 of plaintiff's complaint, and, on that basis, deny generally  
16 and specifically each and every allegation contained in said paragraph.

17 25. Defendants have insufficient information and knowledge to respond to the  
18 allegations contained in paragraph 25 of plaintiff's complaint and, on that basis, deny generally  
19 and specifically each and every allegation contained in said paragraph.

20 26. Defendants have insufficient information and knowledge to respond to the  
21 allegations contained in paragraph 26 of plaintiff's complaint and, on that basis, deny generally  
22 and specifically each and every allegation contained in said paragraph.

23 27. Defendants have insufficient information and knowledge to respond to the  
24 allegations contained in paragraph 27 of plaintiff's complaint and, on that basis, deny generally  
25 and specifically each and every allegation contained in said paragraph.

26 28. Defendants have insufficient information and knowledge to respond to the  
27 allegations contained in paragraph 28 of plaintiff's complaint and, on that basis, deny generally

1 and specifically each and every allegation contained in said paragraph.

2 29. Defendants have insufficient information and knowledge to respond to the  
3 allegations contained in paragraph 29 of plaintiff's complaint and, on that basis, deny generally  
4 and specifically each and every allegation contained in said paragraph.

5 30. Defendants have insufficient information and knowledge to respond to the  
6 allegations contained in paragraph 30 of plaintiff's complaint, and, on that basis, deny generally  
7 and specifically each and every allegation contained in said paragraph.

8 31. Defendants have insufficient information and knowledge to respond to the  
9 allegations contained in paragraph 31 of plaintiff's complaint, and, on that basis, deny generally  
10 and specifically each and every allegation contained in said paragraph.

11 32. Defendants have insufficient information and knowledge to respond to the  
12 allegations contained in paragraph 32 of plaintiff's complaint, and, on that basis, deny generally  
13 and specifically each and every allegation contained in said paragraph.

14 33. Defendants have insufficient information and knowledge to respond to the  
15 allegations contained in paragraph 33 of plaintiff's complaint, and, on that basis, deny generally  
16 and specifically each and every allegation contained in said paragraph.

17 34. Defendants have insufficient information and knowledge to respond to the  
18 allegations contained in paragraph 34 of plaintiff's complaint, and, on that basis, deny generally  
19 and specifically each and every allegation contained in said paragraph.

20 35. Defendants have insufficient information and knowledge to respond to the  
21 allegations contained in paragraph 35 of plaintiff's complaint, and, on that basis, deny generally  
22 and specifically each and every allegation contained in said paragraph.

23 36. Defendants have insufficient information and knowledge to respond to the  
24 allegations contained in paragraph 36 of plaintiff's complaint, and, on that basis, deny generally  
25 and specifically each and every allegation contained in said paragraph.

26 37. Defendants have insufficient information and knowledge to respond to the  
27 allegations contained in paragraph 37 of plaintiff's complaint, and, on that basis, deny generally

1 and specifically each and every allegation contained in said paragraph.

2 38. Defendants have insufficient information and knowledge to respond to the  
3 allegations contained in paragraph 38 of plaintiff's complaint, and, on that basis, deny generally  
4 and specifically each and every allegation contained in said paragraph.

5 39. Defendants have insufficient information and knowledge to respond to the  
6 allegations contained in paragraph 39 of plaintiff's complaint, and, on that basis, deny generally  
7 and specifically each and every allegation contained in said paragraph.

8 40. Defendants have insufficient information and knowledge to respond to the  
9 allegations contained in paragraph 40 of plaintiff's complaint, and, on that basis, deny generally  
10 and specifically each and every allegation contained in said paragraph.

11 41. Defendants have insufficient information and knowledge to respond to the  
12 allegations contained in paragraph 41 of plaintiff's complaint, and, on that basis, deny generally  
13 and specifically each and every allegation contained in said paragraph.

14 42. Defendants have insufficient information and knowledge to respond to the  
15 allegations contained in paragraph 42 of plaintiff's complaint, and, on that basis, deny generally  
16 and specifically each and every allegation contained in said paragraph.

17 43. Defendants have insufficient information and knowledge to respond to the  
18 allegations contained in paragraph 43 of plaintiff's complaint, and, on that basis, deny generally  
19 and specifically each and every allegation contained in said paragraph.

20 44. Defendants have insufficient information and knowledge to respond to the  
21 allegations contained in paragraph 44 of plaintiff's complaint, and, on that basis, deny generally  
22 and specifically each and every allegation contained in said paragraph.

23 45. Defendants have insufficient information and knowledge to respond to the  
24 allegations contained in paragraph 45 of plaintiff's complaint, and, on that basis, deny generally  
25 and specifically each and every allegation contained in said paragraph.

26 46. Defendants have insufficient information and knowledge to respond to the  
27 allegations contained in paragraph 46 of plaintiff's complaint, and, on that basis, deny generally

1 and specifically each and every allegation contained in said paragraph.

2 47. Defendants have insufficient information and knowledge to respond to the  
3 allegations contained in paragraph 47 of plaintiff's complaint, and, on that basis, deny generally  
4 and specifically each and every allegation contained in said paragraph.

5 48. Defendants have insufficient information and knowledge to respond to the  
6 allegations contained in paragraph 48 of plaintiff's complaint and, on that basis, deny generally  
7 and specifically each and every allegation contained in said paragraph.

8 49. Defendants have insufficient information and knowledge to respond to the  
9 allegations contained in paragraph 49 of plaintiff's complaint and, on that basis, deny generally  
10 and specifically each and every allegation contained in said paragraph.

11 50. Defendants have insufficient information and knowledge to respond to the  
12 allegations contained in paragraph 50 of plaintiff's complaint, and, on that basis, deny generally  
13 and specifically each and every allegation contained in said paragraph.

14 51. Defendants have insufficient information and knowledge to respond to the  
15 allegations contained in paragraph 51 of plaintiff's complaint, and, on that basis, deny generally  
16 and specifically each and every allegation contained in said paragraph.

17 52. Defendants have insufficient information and knowledge to respond to the  
18 allegations contained in paragraph 52 of plaintiff's complaint, and, on that basis, deny generally  
19 and specifically each and every allegation contained in said paragraph.

20 53. Defendants have insufficient information and knowledge to respond to the  
21 allegations contained in paragraph 53 of plaintiff's complaint, and, on that basis, deny generally  
22 and specifically each and every allegation contained in said paragraph.

23 54. Defendants have insufficient information and knowledge to respond to the  
24 allegations contained in paragraph 54 of plaintiff's complaint, and, on that basis, deny generally  
25 and specifically each and every allegation contained in said paragraph.

26 55. Defendants have insufficient information and knowledge to respond to the  
27 allegations contained in paragraph 55 of plaintiff's complaint, and, on that basis, deny generally

1 and specifically each and every allegation contained in said paragraph.

2       56. Defendants have insufficient information and knowledge to respond to the  
3 allegations contained in paragraph 56 of plaintiff's complaint, and, on that basis, deny generally  
4 and specifically each and every allegation contained in said paragraph.

5       57. Defendants have insufficient information and knowledge to respond to the  
6 allegations contained in paragraph 57 of plaintiff's complaint, and, on that basis, deny generally  
7 and specifically each and every allegation contained in said paragraph.

8       58. Defendants have insufficient information and knowledge to respond to the  
9 allegations contained in paragraph 58 of plaintiff's complaint, and, on that basis, deny generally  
10 and specifically each and every allegation contained in said paragraph.

11       59. Defendants have insufficient information and knowledge to respond to the  
12 allegations contained in paragraph 59 of plaintiff's complaint, and, on that basis, deny generally  
13 and specifically each and every allegation contained in said paragraph.

14       60. Defendants have insufficient information and knowledge to respond to the  
15 allegations contained in paragraph 60 of plaintiff's complaint, and, on that basis, deny generally  
16 and specifically each and every allegation contained in said paragraph.

17       61. Defendants have insufficient information and knowledge to respond to the  
18 allegations contained in paragraph 61 of plaintiff's complaint, and, on that basis, deny generally  
19 and specifically each and every allegation contained in said paragraph.

20       62. Defendants have insufficient information and knowledge to respond to the  
21 allegations contained in paragraph 62 of plaintiff's complaint, and, on that basis, deny generally  
22 and specifically each and every allegation contained in said paragraph.

23       63. Defendants have insufficient information and knowledge to respond to the  
24 allegations contained in paragraph 63 of plaintiff's complaint, and, on that basis, deny generally  
25 and specifically each and every allegation contained in said paragraph.

26       64. Defendants have insufficient information and knowledge to respond to the  
27 allegations contained in paragraph 64 of plaintiff's complaint, and, on that basis, deny generally



1 and specifically each and every allegation contained in said paragraph.

2 65. Defendants have insufficient information and knowledge to respond to the  
3 allegations contained in paragraph 65 of plaintiff's complaint, and, on that basis, deny generally  
4 and specifically each and every allegation contained in said paragraph.

5 66. Defendants have insufficient information and knowledge to respond to the  
6 allegations contained in paragraph 66 of plaintiff's complaint, and, on that basis, deny generally  
7 and specifically each and every allegation contained in said paragraph

8 67. Defendants have insufficient information and knowledge to respond to the  
9 allegations contained in paragraph 67 of plaintiff's complaint and, on that basis, deny generally  
10 and specifically each and every allegation contained in said paragraph.

11 68. Defendants have insufficient information and knowledge to respond to the  
12 allegations contained in paragraph 68 of plaintiff's complaint and, on that basis, deny generally  
13 and specifically each and every allegation contained in said paragraph.

14 69. Defendants have insufficient information and knowledge to respond to the  
15 allegations contained in paragraph 69 of plaintiff's complaint and, on that basis, deny generally  
16 and specifically each and every allegation contained in said paragraph.

17 70. Defendants have insufficient information and knowledge to respond to the  
18 allegations contained in paragraph 70 of plaintiff's complaint and, on that basis, deny generally  
19 and specifically each and every allegation contained in said paragraph.

20 71. Defendants have insufficient information and knowledge to respond to the  
21 allegations contained in paragraph 71 of plaintiff's complaint and, on that basis, deny generally  
22 and specifically each and every allegation contained in said paragraph.

23 72. Defendants have insufficient information and knowledge to respond to the  
24 allegations contained in paragraph 72 of plaintiff's complaint and, on that basis, deny generally  
25 and specifically each and every allegation contained in said paragraph.

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**AFFIRMATIVE DEFENSES**

AS A FIRST AFFIRMATIVE DEFENSE to each cause of action of plaintiff's complaint, defendants allege that they are immune from liability for the acts and omissions alleged in plaintiff's complaint by virtue of the provisions of Sections 815, 815.2, 815.6, 818, 818.8, 820.2, 820.4, 820.8, 821.6, 822.2, 844.6 and 845.6 of the California Government Code.

AS A SECOND AFFIRMATIVE DEFENSE to each cause of action of plaintiff's complaint, defendants allege that neither plaintiff's complaint nor any of its alleged causes of action state facts sufficient to constitute a cause of action against defendants.

AS A THIRD AFFIRMATIVE DEFENSE to each cause of action of plaintiff's complaint, defendants allege that plaintiff did not use the heightened pleading standards as required by City of Canton v. Harris, 489 U.S. 378 (1989) and its progeny, and have thus failed to state a cause of action against defendant police officers in their individual capacities.

AS A FOURTH AFFIRMATIVE DEFENSE to each cause of action of plaintiff's complaint, defendants allege that they are immune from liability for the arrest, detention and restraint of plaintiff pursuant to the provisions of California Welfare and Institutions Code Section 5154, Government Code Section 856, and Penal Code Sections 835, 835a, 836, and 847, in that the officers had reasonable suspicion/probable cause to believe that plaintiff had committed a public offense/was a danger to others, or to himself, or gravely disabled, and that any and all force used in effecting his arrest, detention and restraint, was lawful, reasonable, and necessary, under the circumstances at the time of the incident.

AS A FIFTH AFFIRMATIVE DEFENSE to each cause of action of plaintiff's complaint, defendants allege that at the time and place mentioned in plaintiff's complaint, defendants' use of force, if any there was, was necessary for defendants' self defense, defense of others, and to effect the lawful detention/arrest of plaintiff.

AS A SIXTH AFFIRMATIVE DEFENSE to each cause of action of plaintiff's complaint, defendants allege that they are entitled to qualified and official immunity. Defendants acted at all times in good faith, with due care, within the scope of discretion, and pursuant to laws,

1 regulations, rules, and practices reasonably believed to be in accordance with the Constitution and  
 2 laws of the United States. There is no liability pursuant to the Federal Civil Rights Act where one  
 3 acts in good faith and entertains an honest, reasonable belief that one's actions are in accord with  
 4 clearly established law.[Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ; Saucier v. Katz, 533  
 5 U.S. 194 (2001); Smith v. Hemet, 394 F.3d 689 (9<sup>th</sup> Cir. 2005).]

6 AS A SEVENTH AFFIRMATIVE DEFENSE to each cause of action of plaintiff's  
 7 complaint, defendants allege that plaintiff was comparatively at fault in the manner and style as  
 8 set forth in Li v. Yellow Cab Company, 13 Cal.3d 804 (1975), and defendants pray that any and  
 9 all damages sustained by plaintiff be reduced by the percentage of his own negligence in the  
 10 happenings herein.

11 AS AN EIGHTH AFFIRMATIVE DEFENSE to each cause of action of plaintiff's  
 12 complaint, defendants allege that the damages sustained by plaintiff, if any, were proximately  
 13 caused, in whole or in part by others for whom these answering defendants are neither liable or  
 14 responsible. Should defendants be found to be liable to plaintiff, which liability is expressly  
 15 denied, said defendants are entitled to have any award against them abated, reduced, or eliminated  
 16 to the extent that the negligence, carelessness, or fault of any of said other persons or entities  
 17 contributed to plaintiff's damages, if any there were.

18 AS A NINTH AFFIRMATIVE DEFENSE to each cause of action of plaintiff's complaint,  
 19 defendants allege that plaintiff's complaint exceeds the scope of the claim presented to defendant  
 20 City of Hayward pursuant to California Government Code §§910 and 911.2.

21 AS A TENTH AFFIRMATIVE DEFENSE to each cause of action of plaintiff's  
 22 complaint, defendants allege that plaintiffs' complaint fails to state a cause of action against these  
 23 defendants under the holding in Monell v. Department of Social Services of the City of New York  
 24 436 U.S. 658 (1978), and its progeny.

25 \_\_\_\_\_AS AN ELEVENTH AFFIRMATIVE DEFENSE to each cause of action of plaintiff's  
 26 complaint, defendants allege that the outcome of the incidents alleged in plaintiff's complaint  
 27 would have been the same regardless of any additional or different training which might have

1 been provided to the officers involved.

2 AS A TWELFTH AFFIRMATIVE DEFENSE to each cause of action of plaintiff's  
3 complaint, defendants allege that at all relevant times, defendants acted independently and not in  
4 association or concert with any agent or servant of any other defendant, including defendants sued  
5 herein under the fictitious names of their employer, employees or agents.

6 AS A THIRTEENTH AFFIRMATIVE DEFENSE to each cause of action of plaintiff's  
7 complaint, defendants allege that plaintiff has failed to mitigate her damages.

8 AS A FOURTEENTH AFFIRMATIVE DEFENSE to each cause of action of plaintiff's  
9 complaint, defendants allege that plaintiff willingly, voluntarily, and knowingly assumed each,  
10 every, and all of the risks and hazards involved in the activities alleged in the complaint.

11 AS A FIFTEENTH AFFIRMATIVE DEFENSE to each cause of action of plaintiff's  
12 complaint, defendants allege that plaintiff's and Solis' own conduct estops plaintiff from claiming  
13 the damages alleged in plaintiff's complaint.

14 AS A SIXTEENTH AFFIRMATIVE DEFENSE to each cause of action of plaintiff's  
15 complaint, defendants allege that defendants are entitled to reasonable attorney's fees and costs of  
16 suit upon prevailing within the meaning of 42 U.S.C. § 1988, California Code of Civil Procedure  
17 §1038, and Rule 11 of the Federal Rules of Civil Procedure.

18 AS A SEVENTEENTH AFFIRMATIVE DEFENSE to each cause of action of plaintiff's  
19 complaint, defendants allege that plaintiff's complaint, in its entirety, is barred by the applicable  
20 statute of limitations.

21 AS AN EIGHTEENTH AFFIRMATIVE DEFENSE to each cause of action of plaintiff's  
22 complaint, defendants allege that defendant City of Hayward and all defendants sued in their  
23 official capacity are immune from the imposition of punitive damages.

24 AS A NINETEENTH AFFIRMATIVE DEFENSE to each cause of action of plaintiff's  
25 complaint defendants allege that because plaintiff's complaint is written in legal conclusory terms,  
26 all affirmative defenses available to defendants cannot be fully anticipated or ascertained at this  
27 time. Accordingly, defendants reserve the right to assert additional affirmative defenses available

1 to defendants that cannot be fully anticipated or ascertained at this time. Accordingly, defendants  
2 reserve the right to assert additional affirmative defenses, if and when the extent that such  
3 affirmative defenses are revealed.

4 **PRAYER**

5 WHEREFORE, defendants pray that plaintiff takes nothing by way of his complaint, that  
6 defendants be dismissed from this action and be awarded their costs and attorney's fees, and for  
7 any other relief that the court may deem just and proper.

8 **DEFENDANTS' DEMAND FOR TRIAL BY JURY**

9 To the clerk of the above entitled court:

10 PLEASE TAKE NOTICE that these answering defendants herein demand a trial by jury as  
11 to all issues triable thereby, herein.

12  
13 DATED: June 10, 2008

MICHAEL S. LAWSON, City Attorney

14  
15 By: /s/  
16 RANDOLPH S. HOM,  
17 Assistant City Attorney  
18 Attorneys for Defendants  
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